FILE COPY

APR 13 1973

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1386

ALFRED J. ERDOS, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH COURT

AUBREY M. DANIEL, III
WILLIAM E. MCDANIELS
1000 Hill Building
Washington, D.C. 20006
Counsel for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Constitutional Provisions Involved	3
Statement of the Case	3
Introduction	3
The Setting and Circumstances of Leahy's Death	4
Pretrial Proceedings	7
Trial Proceedings	9
The Court of Appeals' Holding	10
Reasons for Granting the Writ	11
1. Jurisdiction	11
2. Fifth and Sixth Amendment Violations	18
A. Inability To Secure Exculpatory Testimony	20
B. Restriction of Cross-Examination	23
C. Executive Privilege	25
Conclusion	26
Conclusion	27
Appendix	1a

TABLE OF AUTHORITIES

CASES:

American Banana Co. v. United Fruit Co., 213 U.S. 347 (1908)	12
Barber v. Page, 390 U.S. 719 (1968)	21, 22
Battle v. United States, 209 U.S. 36 (1908)	15
Blackmer v. United States, 284 U.S. 421 (1932)	12

Page

Brady v. Maryland, 373 U.S. 83 (1963) 23
Carey v. Curtis, 44 U.S. 236 (1845)..... 18
Chambers v. Mississippi, — U.S. —, 12 Cr.L. 3150 (1973) 18
Collins v. Yosemite Park & Currey Co., 304 U.S. 518 (1938) 15
Connecticut Mutual Life Ins. Co. v. Lathrop, 111 U.S. 614 (1884) 24
Dorr v. United States, 195 U.S. 138 (1904) 12
Fleming v. Page, 9 How. 603 (1850) 12
Foley Bros. v. Filardo, 336 U.S. 281 (1949) 12
Ft. Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885) .. 15
Gregory v. United States, 125 U.S.App.D.C. 140, 369 F.2d 185 (1966) 20
In re Oliver, 333 U.S. 257 (1948) 18
Jenkins v. United States, 307 F.2d 637 (C.A.D.C. 1962) 24
Kohl v. United States, 91 U.S. 367 (1876) 15
Lockerty v. Phillips, 319 U.S. 182 (1943) 18
Reilly v. Pinkus, 338 U.S. 269 (1949) 24, 25
Sandberg v. McDonald, 248 U.S. 185 (1918) 12
Smith v. Hooey, 393 U.S. 374 (1969) 21
Smith v. Illinois, 390 U.S. 129 (1968) 25
The Signe, 37 F. Supp. 819 (D. La. 1941) 21
United States v. Bowman, 260 U.S. 94 (1922) 12
United States v. Brawner, 471 F.2d 969 (C.A.D.C. 1972) 23
United States v. Flores, 289 U.S. 137 (1933) 12
United States v. Pickett, 470 F.2d 1255 (C.A.D.C. 1972) 24
United States v. Reynolds, 345 U.S. 1 (1953) 2, 25, 26
United States v. Spelar, 338 U.S. 217 (1949) 12
United States v. Wiltberger, 18 U.S. 76 (1820) 12
Washington v. Texas, 388 U.S. 14 (1967) 20

STATUTES AND RULES:

United States Constitution

Fifth Amendment 2, 7, 18, 26
Article I, Section 8, Clause 17 .....14, 15
Sixth Amendment 2, 7, 18, 26

Page

Crimes Act of April 30, 1790, Ch. 9, 1 Stat. 1112 14
Act of March 3, 1825, Ch. 65, § 4, 4 Stat. 115 14
Revised Statutes of 1874, § 5339 14
Criminal Code of 1909, § 72, 35 Stat. 1142 14
Act of February 1, 1940, 54 Stat. 19 16
Act of June 11, 1940, 54 Stat. 304 16
Act of October 9, 1940, 54 Stat. 1083 16
Criminal Code Reform Act of 1973, H.R. 6046 17
18 U.S.C. § 7 .....11, 12, 16
18 U.S.C. § 7(3) 2, 11, 12, 13, 14
18 U.S.C. § 1111 3
18 U.S.C. § 1112 .....3, 11
18 U.S.C. § 1114 3
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1781 21
28 U.S.C. § 1782 21
Rule 15, Fed. R. Crim. P. 21, 22

MISCELLANEOUS:

42 Cong. Rec. 590 15
42 Cong. Rec. 1186 15
Final Report of the National Commission on Reform of Criminal Laws (1971) 17
Freedman and Kaplan, Comprehensive Textbook of Psychiatry (1967) 24
Klein & Temerlin, On Expert Testimony in Sanity Cases, 149 J. Nervous & Mental Disease 435 (1969) 23
Study Draft of a New Federal Criminal Code 17
6 Whiteman, Digest of International Law (1968) 12
7 Whiteman, Digest of International Law (1970) 12
Wigmore, Evidence (3rd ed. 1940) 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

ALFRED J. ERDOS, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH COURT

The petitioner, Alfred J. Erdos, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the judgment of conviction entered by the United States District Court for the Eastern District of Virginia, Alexandria Division.

OPINIONS BELOW

The opinion of the District Court on the issue of jurisdiction and the opinion of the Court of Appeals which are not yet officially reported are reprinted in

the Appendix to this Petition at 6a-18a. The order denying rehearing is at App. 19a.

JURISDICTION

The judgment of the Court of Appeals was entered on February 14, 1973, and a petition for rehearing was denied on March 15, 1973. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1964).

QUESTIONS PRESENTED

1. Whether a United States District Court has jurisdiction under 18 U.S.C. § 7(3) to try the petitioner for an unlawful homicide occurring within an American Embassy located in a foreign country where Congress neither expressly provided nor intended extraterritorial effect for the statute.

2. Whether in the unique circumstances of this case petitioner was denied his right to fair trial guaranteed by the fifth and sixth amendments, particularly:

a. Where petitioner was deprived of exculpatory evidence by the trial court's arbitrary denial of a continuance necessary to secure witnesses and the Government's refusal to stipulate to the testimony of the unavailable witnesses;

b. Where petitioner was prohibited from cross-examining the principal witness against him, a psychiatrist, based upon a reputable psychiatric treatise; and

c. Where the trial court allowed the Government to invoke executive privilege and block relevant evidence without adhering to the standards of *United States* v. *Reynolds*, 345 U.S. 1 (1953).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes and constitutional provisions involved appear in the Appendix hereto at App. 1a-5a.

STATEMENT OF THE CASE

Introduction

On November 11, 1971, an indictment was returned charging Alfred J. Erdos in two counts with premeditated murder in violation of 18 U.S.C. § 1111, and the unlawful killing of a security officer of the Department of State, in violation of 18 U.S.C. § 1114.[1] On March 3, 1972, after a trial by jury, Erdos was convicted of voluntary manslaughter, 18 U.S.C. § 1112. That same day he was sentenced to commitment to the custody of the Attorney General for the maximum period of ten years.

Erdos was convicted of voluntary manslaughter for killing Donald J. Leahy on August 30, 1971, in the United States Embassy in Santa Isabel, Equitorial Guinea. At the time, Erdos and Leahy were both United States citizens employed by the Department of State. Erdos was the chargé d'affairs of the Embassy, and Leahy was his administrative assistant, a general services officer. At his trial, Erdos admitted killing Leahy by stabbing him with a pair of scissors. He interposed the defense of insanity, asserting that the pressures of the paranoid political structure of Equatorial Guinea drove him to a mental breakdown, and he took Leahy's life while suffering from an acute paranoid psychosis and governed by the delusion that Leahy was a communist agent and a direct threat to

[1] This count was dismissed by the Government prior to trial (T. 1/20/72 at 3).

himself, his family and his country. The Government contended, on the other hand, that Erdos had killed Leahy as a reaction to a homosexual act and, aided by his wife, feigned insanity in order to cover up his crime. Erdos denied having had any homosexual contact with Leahy.

The Setting and Circumstances of Leahy's Death

The Republic of Equitorial Guinea is located in west-central Africa. The country was a Spanish colony until October 12, 1968, when it became an independent nation. The United States established diplomatic relations with the country on November 21, 1968, and our Embassy was located in Santa Isabel, the capital, in premises leased by the United States from a private citizen of Equitorial Guinea.

The Erdoses knew prior to their arrival that the government of Equatorial Guinea was hostile to former colonial powers. They knew also that its president, Macias, who ruled by fiat, maintained power by force and was extremely sensitive to criticism. Consequently, Erdos was constantly concerned about his conduct lest it be misinterpreted by the President. (T. 238-43; 246-48; 251-53).

During the initial months of their stay, the country was relatively calm. (T. 533). In mid-August this changed drastically. The government began a wave of mass arrests which became a particular concern to Erdos when, beginning on August 19, the arrestees included his local employees (T. 305-09). During the next two weeks, other extraordinary acts by the government heightened his anxiety. The government restricted his travel, placed a guard outside the embassy and interfered with his communication with other diplomats (T. 313, 314, 317, 321, 725).

Erdos was concerned about his employees because he was aware of beatings and tortures administered by the Equatorial Guinean government. He became frustrated with the inappropriate guidance from the State Department and his inability to obtain any explanation from the Equatorial Guineans (T. 310, 312, 332, 723). The debilitating effect of this on Erdos was noted by State Department officials due to the marked change in the form, content, and frequency of his reports beginning about August 19. Then, by Saturday and Sunday, August 28 and 29, Erdos displayed obvious physical signs of his distress. (T. 329, 331, 333, 733).

Sunday night, Erdos suddenly saw his situation from a brand new angle. This point was fixed by defense psychiatrists as the beginning of the acute phase of his mental illness marked by delusional thinking. His complex delusional thoughts defy summary. In essence, he perceived a plot against him and the United States whereby he would be set up for assassination upon trumped-up charges of collaboration with enemies of the Equatorial Guinean government. (T. 326-29, 741)

Monday morning, Erdos worked feverishly to get the news of his discovery to his government. With the assistance of Leahy he prepared and coded a message conveying the essence of the plot.[2] This message was

---

[2] A decoded copy of this message retrieved from the burn bag of the Embassy was proferred as Defense Exhibit 69 in part to demonstrate the critical point that Leahy was alive at a time when Erdos was delusional. The court's erroneous exclusion of this exhibit is discussed at footnote 9, *infra*. Defense Exhibit 69 appears in the appendix below at 229. Memoranda of Erdos's radio communications later that day also reflecting his delusional thinking were Defense Exhibits 1 and 74 appearing in the appendix below at 231 and 233.

never sent because by noon Erdos had focused on Leahy as the communist-agent mastermind of the plot. Acting on his suspicion, Erdos got Leahy into the vault within the Embassy, where, brandishing scissors, he tied him up. Erdos confronted him with the accusation of conspiracy and every innocent past action of Leahy took on sinister connotations convincing Erdos of Leahy's guilt. Fearing his enemies were immediately outside the Embassy, Erdos turned to the radio as his only hope for rescue. Erdos maintained radio contact with Accra, Ghana throughout the afternoon and his reporting of the situation as he saw it was monitored and recorded. (T. 348-360) Because of irrational directions to him by officials at the end of the afternoon, Erdos broke off radio contact, convinced that even that avenue of communication was compromised. Thereafter Leahy, who had been tied to the chair during the radio transmission, complained about the tightness of bonds and Erdos decided to retie him. During this process, Leahy jumped out of the chair and Erdos stabbed and killed him to prevent his escape. (T. 367-70).

In the hours immediately after Leahy's death, Erdos talked with four people—his wife, Leonard Shurtleff, an American sent to the island, Cienfuegos the Spanish Chargé, and Bassey the Nigerian Ambassador. Erdos readily admitted to each of them that he killed Leahy. He immediately told his wife, the Spanish Chargé and the Nigerian Ambassador about the plot and, as he had done all that day, Erdos pleaded with his listeners to believe him and not to think he was insane. (T. 76, 380-382, 754-755).

After the killing, the Erdos family remained with the Nigerian Ambassador at his residence until Thurs-

day, September 2, when they left Santa Isabel. During this stay, Erdos continued to manifest symptoms of his illness. Upon his return to the United States he was hospitalized by the State Department in the ward for acutely ill mental patients at George Washington University Hospital.

Pretrial Proceedings

Petitioner challenged the jurisdiction of the United States District Court by a pretrial motion to dismiss the indictment on the ground that no federal statute granted jurisdiction to United States courts over the homicide. Petitioner also moved to obtain the Government's assistance in entering Equatorial Guinea to conduct an on-the-scene investigation of the circumstances surrounding the killing and to interview Erdos' diplomatic colleagues and the officials of the Equatorial Guinean government with whom he had had contact at the time of the killing. In the alternative, the motion sought dismissal of the indictment, asserting that absent such an investigation any subsequent trial would violate the fifth and sixth amendments of the Constitution. An evidentiary hearing on the motions was held on January 20, 1972, at which time the Department of State informed the court that no one could enter Equatorial Guinea to investigate the case or they would be arrested (T. 1/20/72, 191; Gov't. Exh. 5). The court then denied the motions to dismiss but encouraged the Government to assist the defense by stipulating to any material evidence. The Government agreed to assist the defense efforts to obtain the witnesses, conceding that independent efforts by defense counsel would otherwise be futile (T. 1/20/72, 187-90, 197-214).

The defense promptly dispatched letters to six of Erdo's diplomatic colleagues[3] who possessed important information, seeking to determine under what conditions their testimony could be obtained. On February 16, 1972, the State Department informed defense counsel that insufficient time existed to have any of these witnesses or their testimony available on February 28, 1972. On February 18, 1972, the defendant moved to continue the trial from February 28, until May 1, 1972, to attempt to obtain the testimony. The Government did not oppose the motion and moved for a continuance itself on other grounds. Both motions were denied. (App. 6a-9a).

Later, the Department of State informed the defense that the government of Ghana would make available the testimony of Mr. Munge by letters rogatory. The defense renewed its motion for a continuance on the first day of the trial, February 28, 1972 (T.2). Counsel informed the court that although the Spanish government had refused to permit Mr. Cienfuegos to testify or be interviewed, the government of Ghana was willing to make its diplomat available by letters rogatory and the French and Nigerian governments had not yet made any decision (T. 2, 3). The court ruled that testimony obtained by letters rogatory or deposition was not admissible and denied the motion. (T. 3,4,5).

Counsel then attempted to obtain stipulations of the expected testimony of Robert, Cienfuegos, and Bassey

---

[3] Specifically, Mr. Jose Cienfuegos, the Spanish Chargé, Ambassador Mbombo Njoyia, Ambassador of the Cameroon, Nigerian Ambassador Bassey, Mr. Frances Maathey, Counsellor of the Embassy of Ghana, Mr. Jean Robert, the French Chargé, and Mr. Elamé Munge, Counsellor of the Embassy of Ghana.

based on their statements to a United States official, classified messages from the Department of State, and information provided by the defendant (T. 10). After examining the stipulations, the court encouraged the Government to stipulate to any evidence helpful to the defense regarding the defendant's action immediately preceding or following the killing. The Government objected to the stipulations (T. 15-17), and the court reaffirmed its denial of the continuance.

Trial Proceedings

The Government presented three witnesses in its case-in-chief: Dr. William F. Enos testified as to the cause of death and to a finding of spermatozoa in the victim's pharynx and esophagus. Mr. Shurtleff recounted the circumstances of his meeting with Erdos at the Embassy, Erdos's admission to him that he had killed Leahy, the discovery and removal of Leahy's body, and his subsequent investigation of the Embassy. The final Government witness, Lannon Walker, described portions of Erdos's radio messages on August 30, and Erdos's conduct in traveling from the Nigerian Ambassador's house to Douala. He also identified various pieces of physical evidence taken from the Embassy, *e.g.*, the scissors which Erdos used to kill Leahy, several jackets and some electrial cord found in the vault.

The defense's case consisted primarily of the testimony of petitioner and his wife concerning the events leading up to and occurring on August 30, with Erdos denying that he had any homosexual contact with Leahy; testimony concerning the radio transmissions of Erdos on August 30 (T. 648-657); Erdos's contact with the Department of State, describing Erdos's reporting

in August (T. 658-666); Ambassador Hoffacker, concerning his selection of Erdos for the position and his assignment, his observation that Erdos was not the man he had known when he saw him shortly after Leahy's death (T. 673-688); and four nurses from the George Washington University Hospital who had attended Erdos from the time he was hospitalized on September 4. The defense also called two psychiatrists, Dr. David H. Fram, the psychiatrist who had been retained by the Department of State to treat Erdos, and Dr. Leon Yochelson, who was retained by the defense. Both doctors testified that petitioner was suffering from an acute paranoid psychosis at the time he killed Leahy.

In rebuttal, the Government called several witnesses who contradicted certain aspects of the defense case but primarily relied on the testimony of two court-appointed psychiatrists, Drs. George D. Weickhardt and Emory H. Hodges. Both testified that Erdos was not suffering from a mental illness when he killed Leahy but that he had subsequently feigned a mental illness to avoid responsibility for his crime. (T. 1017, 1018, 1024, 1038, 1069, 1079, 1085).

The Court of Appeals' Holding

On appeal, petitioner again challenged jurisdiction and raised numerous other errors. The Court of Appeals sustained the District Court's jurisdiction and dismissed without comment thirteen assignments of error as meritless. The Court of Appeals did find that petitioner's right to cross-examination of the Government psychiatrist was improperly curtailed but found the error harmless because "Erdos was given every

opportunity during his trial to present evidence supporting his defense of insanity."

REASONS FOR GRANTING THE WRIT

1. Jurisdiction

This petition presents an issue of federal jurisdiction of exceptional importance which has not been, but should be, settled by this Court; namely, the extraterritorial effect to be afforded certain criminal statutes pursuant to 18 U.S.C. § 7. The Court of Appeals sustained the District Court's jurisdiction over this homicide pursuant to 18 U.S.C. § 1112, which proscribes manslaughter within the special maritime and territorial jurisdiction of the United States as that term is defined in 18 U.S.C. § 7(3), which encompasses in pertinent part:

> (3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

In holding that this so-called "acquired lands" section extends federal criminal jurisdiction to homicide in an American Embassy abroad, the Court of Appeals distorted the plain meaning of the statute, misread its legislative history, and disregarded the applicable principles of statutory construction.

Congress, in exercising its power to define crimes, has generally confined them to the territorial limits of the United States. This Court has thus held that legislation is presumptively territorial, and the presumption

can only be overcome by finding an express intent for extraterritorial effect in the statute or its legislative history.[4] Moreover, statutes defining criminal jurisdiction must be construed strictly. See, *e.g.*, *United States* v. *Wiltberger*, 18 U.S. 76, 95 (1820), interpreting a predecessor subsection of 18 U.S.C. § 7. Since the land acquired by the United States for its Embassy was not a part of United States territory,[5] § 7(3) must be strictly construed to determine if Congress expressly intended it to apply extraterritorially. The Court of Appeals' approach was the antithesis of these principles.

The Court of Appeals first recognized, as does the petitioner, that Congress has the power to proscribe the killing of an American citizen by another American citizen within a diplomatic compound located in a foreign country. The critical question, whether Congress had exercised that power, involves statutory construction. The Court of Appeals construed the statute

---

[4] *United States* v. *Spelar*, 338 U.S. 217 (1949); *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949); *United States* v. *Flores*, 289 U.S. 137, 155 (1933); *Blackmer* v. *United States*, 284 U.S. 421, 437 (1931); *United States* v. *Bowman*, 260 U.S. 94, 97, 98 (1922); *Sandberg* v. *McDonald*, 248 U.S. 185, 196 (1918); *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 357 (1908).

[5] The United States acquired the use of this land for its embassy by a lease agreement between the Department of State and a private citizen of Equatorial Guinea and not by conquest or treaty with the government of Equatorial Guinea, the only means by which the land could be made a part of United States territory. *Fleming* v. *Page*, 9 How. 603 (1850); *Dorr* v. *United States*, 195 U.S. 138 (1904). It is well settled that the land on which our embassies abroad are situated is not United States territory and criminal acts committed there are acts committed within the territories of the countries in which they are located. See generally, 7 Whiteman, *Digest of International Law* (1970), pp. 353-57; and 6 Whiteman, *Digest of International Law* (1968), pp. 278-80.

by compartmentalizing the phrases of § 7(3) and asking whether its third phrase "modifies and limits the more general coverage of the preceding two phrases." App. at 13a. Finding the plain meaning and the legislative history unclear and conceding that Congress may not have focused on extraterritorial jurisdiction at all in the enactment, the court stated its perspective on statutory construction as follows: "Where the power of Congress is clear, and the language of exercise is broad, we can perceive no duty to construe a statute narrowly." App. at 13a. The court then held that the first two phrases of § 7(3) create a jurisdictional category without territorial limits—"lands reserved or acquired for the use of the United States and under its exclusive or concurrent jurisdiction"—and that the third phrase, restricted by its terms to the territorial confines of the United States is separate and distinct.

The Court of Appeals' perspective on statutory construction is fundamentally unsound. The only expression of Congressional intent on the face of the statute is that it be applied territorially. The Court of Appeals sought to avoid this limitation by confining it to the last phrase and then elevating the absence of any limitation in the remaining phrases into an intention of extraterritorial application. The court's reasoning was an express rejection of strict construction and ignored the territorial presumption. Cutting off a phrase in a statute expressing a territorial intent and finding no express intent in the remainder, the court liberally construed the statute to achieve extraterritorial effect.

The legislative history of the statute confirms that the Court of Appeals' parsing of the whole constitutes a misinterpretation of Congress' intent. That history demonstrates that the statute went through

three stages: the original grant of jurisdiction closely tied to its constitutional source, an expansion of the statute to encompass new methods of acquisition of lands from the states, and modification of the requirement of exclusive jurisdiction in order to meet a problem of federalism. With each change, however, Congress expressly indicated it did not intend to expand the original scope of the statute, which was strictly territorial.

The last phrase of the present § 7(3) reflects the wording of the original constitutional source of the statute, Article I, Section 8, Clause 17, which empowered Congress to legislate over the seat of government and lands purchased from the states with the consent of the legislatures. The progenitor of § 7(3) appeared in the Crimes Act of April 30, 1790, Ch. 9, 1 Stat. 1112, 1113, and provided for punishment for murder or manslaughter if committed "within any fort, arsenal, dockyard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States." [6]

The second major phase of the statute was the addition of the phrase "any lands reserved or acquired for the use of the United States", which first appeared in § 72 of the Criminal Code of 1909, 35 Stat. 1142. Significantly, this enactment still retained the requirement that the lands must be under the exclusive jurisdiction of the United States. This new language was added to codify in one statute special jurisdictional sections

[6] The statute was subsequently amended by the Act of March 3, 1825, Ch. 65, § 4, 4 Stat. 115, and § 5339 of the Revised Statutes of 1874. These amendments retained the original language of the statute as enacted in 1790 and the requirement that the enumerated places be under "the sole and exclusive jurisdiction of the United States."

which had previously appeared throughout numerous statutes and to encompass decisions of this Court recognizing means and purposes in addition to those specifically enumerated in Article I, Section 8, Clause 17, by and for which land could be acquired from the states. Congress, however, intended no enlargement of its original grant of territorial jurisdiction. 42 Cong. Rec. 590, 1186.[7]

---

[7] It was long thought that the only method by which the United States could acquire lands within the states was through purchases-by-consent, the only method enumerated in Article I, Section 8, Clause 17. Moreover, acquisition by this method invariably carried with it not only title but a complete legislative dominion with the exception of a permissible reservation by the state of the right to serve civil and criminal processes within the area. Ultimately, however, the Court construed the requirement of consent of the state legislature as a condition only of the acquisition of exclusive legislative jurisdiction, and not as a prerequisite of title or of power to use the land for proper federal purposes. In *Kohl* v. *United States*, 91 U.S. 367 (1876), the Court held that the federal government could exercise "the right of eminent domain within the states, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution." Subsequently the Court ruled that a state could cede exclusive legislative jurisdiction of land acquired otherwise than by purchase—with—consent. *Ft. Leavenworth R.R.* v. *Lowe*, 114 U.S. 525 (1885). This was true even though the land was acquired for a purpose not specified in Article I, Section 8, Clause 17. *Battle* v. *United States*, 209 U.S. 36 (1908) (the acquisition of land for a post office); *Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518 (1938) (jurisdiction ceded over land to be used for a national park).

In reporting the 1909 compilation to the floor, Congressman Sherley referred to this judicial expansion of Article I, Section 8, Clause 17, stating:

> That section has been so enlarged by judicial construction as to embrace practically all different kinds of land now owned by the National Government. 42 Cong. Rec. 590.

Nothing said by Congressman Sherley can be construed as an expression of Congressional intent to apply the statute extraterritorially.

For present purposes, the final form of the statute was accomplished by the Act of June 11, 54 Stat. 304, wherein Congress amended § 451 of the 1940 Code, the predecessor to § 7(3), to include lands under the "exclusive or *concurrent* jurisdiction" of the United States. Prior to this amendment, federal criminal jurisdiction over land deemed desirable. The Act was acquisition by the United States of "exclusive jurisdiction within federal enclaves." By Act of February 1, 1940, 54 Stat. 19, as amended by Act of October 9, 1940, 54 Stat. 1083, Congress authorized officers of departments or agencies in charge of land to accept or secure consent from the states for either exclusive or partial jurisdiction over land deemed desirable. The act was designed to give broad discretion to Government agencies in order that they might obtain only the necessary jurisdiction. The 1940 amendment to 18 U.S.C. § 7 was designed solely to reflect this policy change in governmental acquisitions of land by conferring concurrent jurisdiction on the courts over crimes committed on federal reservations where the Government exercised partial jurisdiction.[8]

Thus, the legislative history buttresses the conclusion that "acquired lands" encompass only those existing within the strict territorial limits of the United States and not land temporarily acquired within the sovereign territory of another country. This conclusion is defi-

[8] The last modification of the statute occurred in 1948 when the Title was revised to its present form with the terms "special maritime and territorial jurisdiction" being substituted for the previous words "the crimes and offenses defined in §§ 451-468 of the Title shall be punished as herein prescribed." The Revisors' note to the 1948 revision indicates that despite minor changes "the extent of the special jurisdiction as originally enacted has been carefully followed."

nitively supported by the draftsmen of recent proposals to amend the Federal Criminal Code. The National Commission on Reform of Federal Criminal Laws reported the need for new legislation to fill jurisdictional gaps caused by Congress' heretofore strict adherence to territorial principles of criminal jurisdiction. In its study, the National Commission specifically concludes that United States courts are without jurisdiction to adjudicate the murder of an American Ambassador by his wife or a member of his staff in a diplomatic compound in a country wherein the American citizen enjoyed diplomatic immunity. Study Draft of a New Federal Criminal Code at XXXI. The Commission transmitted its final report to the President and Congress on January 19, 1971, and proposed adoption of the nationality principle of jurisdiction to cure this defect and others found by this Court. The Final Report of the National Commission on Reform of Criminal Laws, § 208(f), pp. 21-22. The administration has also recently introduced an additional bill entitled Criminal Code Reform Act of 1973, H.R. 6046, which contains a comparable provision.

Any court is loathe to render a decision which means for all practical purposes that petitioner can never be tried on this homicide charge. But the circumstances of this case serve to dramatize the deplorable jurisdictional gap which exists in the federal penal code. This Court should grant certiorari and reverse the holdings below to reaffirm the proper balance separation of power between the judicial and legislative branches. The District Court's assumption of jurisdiction in this case clearly conflicts with the doctrine that judicial power is solely dependent upon the action of Congress

conferring jurisdiction. *Carey* v. *Curtis*, 44 U.S. 236, 245 (1845); *Lockerty* v. *Phillips*, 319 U.S. 182, 187-88 (1943). The proper regard for the separation of powers mandates that the judicial branch refrain from stretching beyond delimited jurisdictional bounds to achieve a desirable result. By acknowledging the jurisdictional gap, additional and appropriate impetus for much-needed legislation will result.

2. Fifth and Sixth Amendment Violations

The fifth and sixth amendments in concert guarantee to a criminal accused a fair opportunity to defend himself. To realize that opportunity an accused must have the effective assistance of counsel, the right to cross-examine the witnesses against him and the ability to offer testimony on his own behalf. *Chambers* v. *Mississippi*, ——U.S.——, 12 Cr.L. 3150, 3153 (1973); *In re Oliver*, 333 U.S. 257, 273 (1948). Here, three factors combined to deprive Erdos of the full benefit of each of the guarantees:

1. The unprecedented locus for a homicide adjudicated in the federal courts — a foreign country so hostile and irrational that it refused entry to investigate the scene of the crime and to interview essential witnesses;
2. Erroneous rulings by the trial court inhibiting and/or precluding the presentation of relevant exculpatory evidence and improperly limiting the cross-examination of critical witnesses against the accused;
3. The government's failure to stipulate to reliable evidence from witnesses otherwise unavailable and then turning the absence of these witnesses to its advantage.

The only contested issue before the jury was whether because of a mental disease petitioner lacked the requisite *mens rea* to hold him responsible for an admitted killing. Resolution of this issue depended entirely on evaluating the credibility of the witnesses. On one level this credibility contest was between the two psychiatrists called by each side. But the fundamental credibility question, essential to resolving the conflict of the experts, was whether Erdos and his wife were telling the truth when they related the events which occurred in Equatorial Guinea and their effect on Mr. Erdos. The differing psychiatric judgments were based solely on the psychiatrists' opposing conclusions as to the honesty of the Erdoses; if they were telling the truth, the diagnosis of mental illness was inescapable. The government psychiatrists, however, disbelieved them principally because Mr. Erdos, despite detailed memory of Leahy's death, in their opinion would not relate the circumstances of the homosexual act the psychiatrists concluded had occurred. The defense psychiatrists opined that if Erdos participated in a homosexual act with Leahy, and they were not satisfied he had, neither the act nor his lack of memory was inconsistent with his mental illness.

Thus, the issue for the jury mirrored that of the psychiatrists—were the Erdoses telling the truth? The government's theory was that Erdos concocted the delusion only after the killing. Thus it had to discredit the Erdoses and disprove any indicia of mental illness in Erdos prior to the killing. The defense desparately needed corroboration for the Erdoses and proof not only of the indicia of mental illness prior to Leahy's death but also proof of the seeds for that disease—the paranoid domestic and international posture of the

Equatorial Guinean government. Against this background, the errors set forth below are individually and in toto urged as reasons for this Court to grant certiorari.

A. Inability to Secure Exculpatory Testimony

The right of a defendant to conduct a pretrial investigation and to present witnesses in his defense is a fundamental element of due process. This Court said in *Washington* v. *Texas*, 388 U.S. 14 (1967):

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. *Id.* at 19.

Due process also requires that the defense and the prosecution have the same opportunity to interview witnesses to insure that the trial is a successful quest for truth. *Gregory* v. *United States*, 125 U.S.App. D.C. 140, 369 F.2d 185, 188 (1966).

The government had the opportunity to investigate the scene and interview witnesses denied the defense. The fruits of the physical investigation of the scene—body, scissors, cord, clothing, etc.—were introduced to meet the burden of proving homicide. The defense's burden of persuasion was to convince the jury of Erdos lack of responsibility. For that purpose the defense needed the testimony of the people who knew Erdos on Equatorial Guinea—his diplomatic colleagues—at least the last person to see him before Leahy's death (Robert—France), the first person to see him afterwards (Cienfuegos—Spain) and his constant companion for three days after the death (Bassey—

Nigeria). After Leahy's death, Ambassador Hoffacker took statements from each of these men which provided much-needed corroboration of the Erdos's testimony of events on Equatorial Guinea and his aberrant behavior before[9] and after the killing, and, in part contained opinions as to his mental illness. Petitioner's inability to conduct his own investigation coupled with the court's denial of a continuance to secure the witnesses and the government's refusal to stipulate to their statements rendered the resultant trial fundamentally unfair.[10]

With the assistance of the State Department, petitioner diligently sought the testimony of these men.

---

[9] On the critical issue of mental disease prior to Leahy's death, the trial court's misapplication of the hearsay rule deprived petitioner of critical evidence. Defense Exhibit 69 was a transcript of the message which Erdos described preparing with the aid of Leahy the morning of Leahy's death. It was recovered by government officials from the Embassy and decoded by the Department of State. The message and its method of preparation corroborate that petitioner expressed delusional thoughts prior to Leahy's death. This message, if admitted, would have been the defense's single most important exhibit and no respectable argument can be advanced for excluding it. Its authenticity was stipulated, it was relevant, and it was not hearsay.

[10] The witnesses sought here were foreign nationals beyond the formal subpoena power of the court. Doctrinaire concepts of "power" and "authority" cannot submerge the constitutional right to a fair trial. Smith v. Hooey, 393 U.S. 374, 381 (1969). Procedures exist in international law and comity for the production of testimony from foreign witnesses analogous to the interstate compacts for the production of witnesses this Court required to be exhausted in Barber v. Page, 390 U.S. 719 (1968). See The Signe, 37 F. Supp. 819 (D.C. La. 1941). See also 28 U.S.C. §§ 1781, 1782; Rule 15, Fed. R. Crim. P. Petitioner was working within these procedures when his efforts were curtailed by the denial of continuance.

His requests for a continuance of two months to complete these sensitive negotiations were repeatedly denied. When last requested, only the government of Spain had formally declined to make Mr. Cienfuegos available. Neither the French nor the Nigerian government had responded, and the government of Ghana was willing to make Mr. Munge available for testimony by letters rogatory. Had a continuance been granted, his testimony and that of the others might have been obtained in an admissible form. The denial of the continuance was without any valid reason. To the extent it was influenced by the court's belief depositions were inadmissible in a criminal trial, he was clearly in error. See Rule 15, Fed. R. Crim. P. The only other suggested basis for denying a continuance which was also sought by the government was citation to a policy of this Court to dispense "federal justice . . . within a minimum length of time." (T. 2 18 72, 16-17) This salutary policy should not be so maligned; justice in this instance demanded the continuance.

The prosecution's good faith efforts to obtain the testimony of absent witnesses required by *Barber* v. *Page*, 390 U.S. 719 (1968) ended with the court's denial of the continuance. Ignoring the court's encouragement, the prosecution refused to stipulate to any part of the expected testimony of the witnesses. Then, despite the corroborative statements in its files, the Government repeatedly branded the Erdoses as liars and urged the jury to reject the insanity defense "simply [because of] the lack of evidence from anybody but Erdos and his wife." (T. 1172) If failing to disclose exculpatory information violates due process of law, so too does refusing reasonable efforts

to place it before the trier of fact and then taking advantage of its absence. *Cf., Brady* v. *Maryland,* 373 U.S. 83 (1963).

A continuance was necessary to exhaust the government's good-faith efforts to obtain the witnesses' testimony but the court denied it. The court encouraged the government to stipulate to the testimony but the government refused and then turned the missing witnesses to its advantage. The result was the loss of favorable testimony to the accused and a trial which did not comport with the fifth and sixth amendments.

B. Restriction of Cross-Examination

The most difficult task for an advocate involved in a contested insanity defense is to refute the opinion of a psychiatric expert that the accused is feigning mental illness. See *United States* v. *Brawner,* 471 F.2d 969, 1036-37 (CADC, 1972) (Bazelon, J. concurring). One recent study based on 96 mock juries concludes:

> jurors were influenced by expert testimony when the testimony was not conflicting. In cases of conflicting expert testimony, or when there was no expert witness, there was a tendency for the jury to vote sane even though the defendant was clearly psychotic by the usual clinical criteria.

Klein & Temerlin, *On Expert Testimony in Sanity Cases,* 149 J. Nervous & Mental Disease 435, 438 (1969).

In addition to presenting two psychiatrists including the treating physician who unqualifiedly found psychosis, the defense attempted to overcome the conflicting diagnoses of malingering by cross-examination and

rebuttal. Both avenues of attack were erroneously cut off.[11]

Dr. Emory F. Hodges, one of the government's two psychiatrists, stated during both direct and cross-examination that he did "not find evidence of psychosis or insanity in Mr. Erdos" at the time of the killing. (T. 1058, 1066, 1117-18). Defense counsel sought to discredit this opinion by cross-examining Hodges from a leading psychiatric work, A. Freedman and H. Kaplan, *Comprehensive Textbook of Psychiatry*, Chapter 16 (1967), which cites the symptoms displayed by Erdos as the classic pattern of an acute paranoid psychosis. (T. 1117-18). Under questioning, Hodges recognized the treatise as being co-edited by the President Elect of the American Psychiatric Association, but further qualification of the treatise and examination from it were precluded by the court because the witness had not "read it all" and was "more unfamiliar than familiar" with it.

In 1949, this Court unequivocally held that such a ruling "was an undue restriction on the right to cross-examine". *Reilly* v. *Pinkus*, 338 U.S. 269, 275 (1949). The Court of Appeals recognized the restriction as

---

[11] By a series of incorrect rulings, the court barred four experienced psychiatric nurses from giving opinion testimony as to petitioner's mental illness and from rebutting the allegation of malingering. Against the clear weight of authority and applicable decisions of this Court, the trial court applied a *per se* rule that only psychiatrists could render expert opinion testimony as to insanity and excluded all lay opinion on the issue. See, *Connecticut Mutual Life Ins. Co.* v. *Lathrop*, 111 U.S. 614 (1884); *United States* v. *Pickett*, 470 F.2d 1255 (C.A.D.C. 1972); *Jenkins* v. *United States*, 307 F.2d 637 (C.A.D.C. 1962) *(en banc)*; and J. Wigmore, *Evidence*, § 1638 (3d ed. 1940).

error but considered it harmless because petitioner had every opportunity to present his insanity defense. Of course this petition argues he did not. But moreover *Reilly* v. *Pinkus* rejected the concept of harmless error where intent of the party was an issue. And *Reilly* involved a civil case where the fact-finder actually read the excluded portions and concluded his findings would have been the same. *Id.* at 276. An effective attack on the gross inaccuracies in Hodges' testimony was of utmost importance to petitioner's defense. Hodges, who labelled Erdos a liar and malingerer, was petitioner's principal "accuser". The substantial restriction on his right to confront him by full cross-examination was error of constitutional proportions and in no sense harmless. See *Smith* v. *Illinois*, 390 U.S. 129 (1968).

C. Executive Privilege

Without regard for this Court's leading case on executive privilege, *United States* v. *Reynolds*, 345 U.S. 1 (1953), the Government invoked its privilege to block admissibility of twelve messages from Erdos to the State Department. (T. 290). The messages were relevant—they corroborated events which later became twisted into the delusional messages of August 30—and were not cumulative to the many other messages to which the Government did not exercise privilege. The Government originally sought excision of portions of the messages and when the court refused, opted to protect what it considered to be state secrets, namely, "the universal practice of not revealing diplomatic sources." (T. 285). The trial court ignored *Reynolds* in three respects. It did not enforce the requirement that the head of the government agency invoke the privilege

after personal review; it did not conduct an inquiry into the validity of the claimed privilege, and, finally, it permitted relevant evidence to be excluded in a criminal case under claim of state secret without requiring dismissal of the charges. At a time when governmental privilege threatens to become a major obstacle to the ascertainment of truth, this Court must check any erosion of the *Reynolds* doctrine.

CONCLUSION

The district court began the trial by denying without cause a continuance sought by both the prosecution and the defense which would have given time to exhaust available opportunities to produce testimony of foreign witnesses known to corroborate Erdos's version of the events, particularly his unstable condition immediately before and after Leahy's death. Then despite the court's encouragement, the prosecution refused to stipulate to the admissibility of statements from these witnesses made to a government investigator. During the trial, the court improperly restricted the defense's testing of government psychiatrists by preventing cross-examination upon learned treatises and refused to permit four psychiatric nurses to testify in rebuttal to the accusation of feigning. Finally, the court permitted the prosecution to exercise executive privilege and block the admissibility of messages demonstrating Erdos's knowledge of events which later precipitated his delusion, and misapplied the hearsay rule to exclude writings reflecting or affecting Erdos's state of mind. These errors, deprived Erdos of his right to due process, confrontation and a fair trial guaranteed by the fifth and sixth amendments and compel this Court's redress.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

AUBREY M. DANIEL, III
WILLIAM E. MCDANIELS
1000 Hill Building
Washington, D.C. 20006
Counsel for Petitioner

APPENDIX

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 7 provides:

> § 7. Special maritime and territorial jurisdiction of the United States defined.
>
> The term 'special maritime and territorial jurisdiction of the United States,' as used in this title, includes:
>
> (1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United

States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

(2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, or any of the waters connecting them or upon the Saint Lawrence River where the same constitutes the International Boundary Line.

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

(4) Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.

(5) Any aircraft belonging in whole or in part to the United States, or any State, Territory, District or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

18 U.S.C. § 1111 provides:

§ 1111. Murder

(a) Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.

Any other murder is murder in the second degree.

(b) Within the special Maritime and territorial jurisdiction of the United States.

Whoever is guilty of murder in the first degree, shall suffer death unless the jury qualifies its verdict by adding thereto 'without capital punishment,' in which event he shall be sentenced to imprisonment for life;

Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life."

18 U.S.C. § 1112 provides:

§ 1112. Manslaughter

(a) Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

Voluntary—Upon a sudden quarrel or heat of passion.

Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.

(b) Within the special maritime and territorial jurisdiction of the United States.

Whoever is guilty of voluntary manslaughter, shall be imprisoned not more than ten years;

Whoever is guilty of involuntary manslaughter, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

18 U.S.C. § 1114 provides:

§ 1114. Protection of officers and employees of the United States

Whoever kills any judge of the United States, any United States Attorney, any Assistant United States Attorney, or any United States marshal or deputy marshal or person employed to assist such marshal or deputy marshal, any officer or employee of the Federal Bureau of Investigation of the Department of Justice, any officer or employee of the Postal Service, or any officer or employee of the secret service or of the Bureau of Narcotics and Dangerous Drugs, any officer or enlisted man of the Coast Guard, any officer or employee of any United States penal or correctional institution, any officer, employee or agent of the customs or of the internal revenue or any person assisting him in the execution of his duties, any immigration officer, any officer or employee of the Department of Agriculture or of the Department of the Interior designated by the Secretary of Agriculture or the Secretary of the Interior to enforce any Act of

Congress for the protection, preservation, or restoration of game and other wild birds and animals, any employees of the Department of Agriculture designated by the Secretary of Agriculture to carry out any law or regulation, or to perform any function in connection with any Federal or State program or any program of Puerto Rico, Guam, the Virgin Islands of the United States, or the District of Columbia, for the control or eradication or prevention of the introduction or dissemination of animal diseases, any officer or employee of the National Park Service, any officer or employee of, or assigned to duty in, the field service of the Bureau of Land Management, any employee of the Bureau of Animal Industry of the Department of Agriculture, or any officer or employee of the Indian field service of the United States, or any officer or employee of the National Aeronautics and Space Administration directed to guard and protect property of the United States under the administration and control of the National Aeronautics and Space Administration, any security officer of the Department of State or the Foreign Service, or any officer or employee of the Department of Health, Education, and Welfare designated by the Secretary of Health, Education, and Welfare to conduct investigations or inspections under the Federal Food, Drug, and Cosmetic Act while engaged in the performance of his official duties, or on account of the performance of his official duties, shall be punished as provided under sections 1111 and 1112 of this title.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division
Criminal No. 414-71-A

UNITED STATES OF AMERICA

v.

ALFRED ERDOS

Order

Upon consideration of the evidence and exhibits tendered, the briefs and authorities cited therein, and argument of counsel, the Court is of the opinion that the defendant's motion to dismiss count one of the indictment [1] on the grounds that this Court lacks both jurisdiction and venue, ought to be denied, and

IT IS SO ORDERED.

Count one charges the defendant with premeditated murder within the United States Embassy at Santa Isabel, Equatorial Guinea, in violation of 18 U.S.C. § 1111.

Congress has expressly extended its prohibition of the crime of murder to the special maritime and territorial jurisdiction of the United States. 18 U.S.C. § 1111(b).

This includes:

> "Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof . . ." 18 U.S.C. § 7(3).

The American Embassy at Santa Isabel, Equatorial Guinea, is on lands reserved or acquired for the use of the United States, and the Court so finds—The alleged murder occurred within the confines of that Embassy. (See stipulation.)

---

[1] Count two was dismissed by the United States in open court.

Had Congress intended to limit the jurisdiction of the United States district courts in such cases to the continental limits of the United States—as the defendant urges—jurisdiction in § 1111 cases would not have been extended to include acts occurring within the special maritime and territorial jurisdiction of the United States.

Viewed from another angle, this Court has jurisdiction under the protective principle.

That principle, one of the five bases of jurisdiction with respect to the enforcement of criminal laws, provides that a state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct outside its territory that threatens its security as a state or the operation of its governmental functions, provided the conduct is generally recognized as a crime under the law of states that have reasonably developed legal systems.

The alleged murder here clearly interfered with the foreign affairs of the United States and its diplomatic relations with Equatorial Guinea, and the Court so finds—In fact, the United States Embassy at Santa Isabel ceased functioning for a substantial period of time as a direct result thereof.

There is also considerable authority that this Court could assume jurisdiction under the nationality principle even if the alleged murder did not take place within the confines of the United States Embassy—which is a part of territory of the United States.

This principle was discussed by the Supreme Court of the United States in Skiriotes v. Florida, 313 U.S. 69 (1941), wherein it is stated:

> ". . . [T]he United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or

> other nationals are not infringed. With respect to such an exercise of authority there is no question of international law, but solely of the purport of the municipal law which establishes the duty of the citizen in relation to his own government . . . ."

The accused and the victim here were both American citizens. The crime occurred in an American Embassy located on lands acquired for the use of the United States (here leased land). The defendant was a United States diplomat accredited to Equatorial Guinea—As such he possessed diplomatic immunity from prosecution by the Equatorial Guinea authorities. The defendant was not arrested in Equatorial Guinea—To the contrary, he was allowed to leave that country.

International law recognizes that the United States has responsibility for criminal jurisdiction over the defendant in this case.

> "Jurisdictional immunity remains as a universally recognized principal incorporated into the body of international law which civilized nations accept as binding through custom, municipal legislation, and judicial decisions . . . . However, diplomats do not escape the jurisdiction of the courts of their home state. It would appear as if they remain domiciled on the territory of the sending state in matters of civil and criminal jurisdiction." See Wilson, Diplomatic Privileges and Immunities, 32 (Univ. Arizona Press, 1967).

The Vienna Convention on Diplomatic Relations codified the foregoing recognized principle. See Article 31(1) and (4).

> (1) A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state.

* * * * * *

(4) The immunity of a diplomatic agent from the jurisdiction of the receiving state does not exempt him from the jurisdiction of the sending state.

Thus, the responsibility and authority of the United States to prosecute its diplomats for crimes committed abroad, and especially those committed in its embassies and consulates, rest not only under 18 U.S.C. § 1111 but also under the internationally recognized protective and nationalistic principles of law.

Venue in this court is claimed on the ground the defendant was first found after the offense in the Alexandria Division of this court. 18 U.S.C. § 3238.

It is clear from the evidence presented that the defendant voluntarily returned to the United States after the date of the alleged murder—He was first found in the Alexandria Division of this court prior to the return of this indictment—The complaint was served upon him when he debarked from the airplane that brought him from Europe[2] to Dulles International Airport—Dulles is within the territorial confines of the Alexandria Division of the Eastern District of Virginia, and the Court so finds.

This case will proceed to trial as scheduled, beginning at 10:00 a.m. on February 28, 1972.

The Clerk will send a copy of this order to the United States Attorney for this District and to the attorney of record for the defendant.

/s/ Oren R. Lewis
United States District Judge

January 27, 1972

---

[2] He flew from Equatorial Guinea to Europe on private and commercial airplanes with several stops en route.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1328

UNITED STATES OF AMERICA, *Appellee*,

v.

ALFRED ERDOS, *Appellant*.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge

Argued October 30, 1972
Decided February 14, 1973

Before HAYNSWORTH, *Chief Judge*, CRAVEN and WIDENER, Circuit Judges

William E. McDaniels and Aubrey M. Daniel, III, (Williams, Connolly and Califano on brief) for Appellant; Justin W. Williams, Assistant United States Attorney, (Brian P. Gettings, United States Attorney, on brief) for Appellee.

CRAVEN, Circuit Judge:

On August 30, 1971, in the American Embassy in the new Republic of Equatorial Guinea, Alfred Erdos killed Donald Leahy. Both were American citizens and embassy employees, with Erdos occupying the position of senior diplomat or charge d'affairs.

Returned to the United States, Erdos was tried and convicted of voluntary manslaughter[1] in the District Court

---

[1] 18 U.S.C. § 1112 provides:

"(a) Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

Voluntary—Upon a sudden quarrel or heat of passion.

Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful

for the Eastern District of Virginia. On appeal, the more important issues raised are whether the district court:

(1) had jurisdiction to try Erdos for a crime occurring within an American embassy located in a foreign country; (2) erred in holding that venue lay in the Eastern District of Virginia rather than the District of Massachusetts where the plane bearing Erdos first landed; and (3) improperly curtailed the cross-examination of a psychiatrist from a psychiatric treatise. We conclude there was jurisdiction and venue, and that the district judge's error in curtailing cross-examination was not sufficiently prejudicial to require reversal. We have also considered the other 13 assigned points of error and find them to be without merit. Accordingly, the judgment below will be affirmed.

Jurisdiction

The district court based jurisdiction upon 18 U.S.C. § 7, which provides in part:

> The term "special maritime and territorial jurisdiction of the United States", as used in this title, includes:
>
> * * * * * * * * *
>
> (3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, *or* any place purchased or otherwise acquired by the United States by consent of the

---

manner, or without due caution and circumspection, of a lawful act which might produce death.

(b) Within the special maritime and territorial jurisdiction of the United States,

Whoever is guilty of voluntary manslaughter, shall be imprisoned not more than ten years;

Whoever is guilty of involuntary manslaughter, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

> legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building. [Emphasis added].

The power of Congress to lawfully proscribe the killing of an American citizen by another American citizen within a diplomatic compound located in a foreign country is, we think, beyond question. U.S. Const. art III, § 2; *United States* v. *Flores*, 289 U.S. 137, 146-47 (1933); *United States* v. *Bowman*, 260 U.S. 94, 96-98 (1922). The problem is not one of power but of intention, *i.e.*, statutory construction. Erdos contends that the district court lacked jurisdiction to try him for an offense committed outside the territorial limits of the United States because Congress has not exercised its constitutional power so as to extend American criminal court jurisdiction to the United States Embassy in Equatorial Guinea. It is urged that 18 U.S.C. § 7(3) must be read to apply only to areas within the geographical boundaries of the United States and may not be given extraterritorial effect.

The embassy in question is leased by the United States from a private citizen of the new Republic of Equatorial Guinea. This lease agreement does not itself defeat criminal jurisdiction, however, since fee simple "ownership" of the property by the United States is not a prerequisite to such jurisdiction. As the court in *United States* v. *Archer*, 51 F. Supp. 708 (S.D. Cal. 1943), said at 709:

> A consulate is, ordinarily, a building owned by the Government of the United States. And although it be not owned by the United States, it is a part of the territory of the United States of America.

In *Bowman*, *supra*, at 98-99, both public and *private* ships on the high seas were characterized as "constructively" a part of the territory of the United States. Subsection (3) is not framed in the language of conveyancing. The test,

s to property within or without the United States, is one f practical usage and dominion exercised over the embassy r other federal establishment by the United States govern- ient.

The much harder question is whether the third phrase of 7(3) (dealing with places acquired by the federal govern- ient with the consent of the states and thus presumably ithin the territorial boundaries of the United States) odifies and limits the more general coverage of the pre- eding two phrases. The meaning is not perfectly clear. Vor is the legislative history.[2] Such an interpretation is ot implausible, and, indeed, it is possible that when the tatute was enacted the attention of the Congress was not n the slightest focused on extraterritorial jurisdiction. 3ut if so, why the broad general language of phrases one nd two—wholly unnecessary to implement the establish- ient of forts, dockyards and other needful buildings with- n the states plainly accomplished by phrase three?

Where the power of the Congress is clear, and the langu- ge of exercise is broad, we perceive no duty to construe a tatute narrowly. The first two phrases connected by the onjunctive "and" relate to and modify each other. The esult is to create a jurisdictional category: lands reserved r acquired for the use of the United States and under its xclusive or concurrent jurisdiction. It is only the third hrase, separated from the first two by a comma and the isjunctive "or", that limits jurisdiction to places acquired (within the United States presumably) by the consent of tate legislatures. We think the third phrase is indepen- lent of and does not modify the first two, and so read, the entence describes two kinds of places or lands within the "special" jurisdiction of the United States.

---

[2] *See e.g.*, 42 Cong. Rec. 590, 1186 (1909) (remarks of Senator Heyburn and Congressman Sherley).

We hold that 18 U.S.C. § 7(3) is a proper grant of "special" territorial jurisdiction embracing an embassy in a foreign country acquired for the use of the United States and under its concurrent jurisdiction. We further hold that 18 U.S.C. § 1112 is a specific grant of subject matter jurisdiction with respect to manslaughter committed at a place within the special maritime and territorial jurisdiction of the United States.

Venue

Venue, in cases of crimes committed outside any district, is controlled by 18 U.S.C. §3238,[3] which provides in part that venue shall be in the district within the United States where the offender "is arrested or first brought." The statute has a long history.[4] It was first enacted in 1790, amended in 1825, again in 1874, and most recently in 1963. In its original form, the statute used the word "apprehended." The 1825 version used the words "first apprehended." In the 1874 version the word "found" was substituted for the words "first apprehended," but in the latest reenactment, the Congress reverted to the original idea of restraint and substituted the word "arrested" for the word "found." The legislative history of the 1963

[3] 18 U.S.C. § 3238 provides:

> The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.

[4] *See* Orfield, *Venue in Federal Criminal Cases*, 17 U. Pitt. L. Rev. 375, 393-98 (1956).

version explains that "The term 'found' in most cases means 'arrested.' " 1963 U.S. Code Cong. & Ad. News 660.

The various versions of the statute have been construed time and again. *E.g.*, *United States* v. *Provoo*, 215 F.2d 531, 537 (2d Cir. 1954); *United States* v. *Townsend*, 219 F. 761, 762 (2d Cir. 1915). The cases seem to agree, whether construing the words "found," "apprehended," or "first apprehended," that the Congress had restraint in mind. We think the phrase in the current version of the statute that venue shall be in the district in which the offender "is arrested or is first brought" means simply "arrested"—*i.e.*, that venue is in that district within the United States where the offender is first restrained of his liberty in connection with the offense charged. Obviously, "first brought" could plausibly be interpreted to mean what it says, so that wherever an offender (traveling by air) touches down in the United States, that is the place where trial must be had. But it is settled otherwise. "First brought" within the context of the statute means first brought *in custody* with liberty restrained. *United States* v. *Ross*, 439 F.2d 1355, 1358 (9th Cir. 1971); *Provoo*, *supra*, at 537; *Chandler* v. *United States*, 171 F.2d 921, 927, 932-33 (1st Cir. 1948); *Kerr* v. *Shine*, 136 F. 61, 63-65 (9th Cir. 1905).

The commercial airplane in which Erdos returned to the United States was scheduled to make its initial landing in the United States at Dulles International Airport—located in the Eastern District of Virginia. Instead, it made an unscheduled intermediate stop in Boston, Massachusetts.

Erdos contends that the District of Massachusetts is the district with exclusive venue because that is the district into which he was "first brought." He would be correct but for the judicial gloss, to which we have adverted, that has long since been applied to the statute.

The district court found as a fact that Erdos was not in custody on the return flight to the United States, nor in

Boston, stating that "all the evidence was he was free to go where he wanted to," even when the plane landed at Dulles.[5] The district court, consequently, determined that Erdos was "first found" at Dulles when he was served with the complaint and summons upon his arrivel there. For reasons previously stated, we read "first found" as meaning arrested. But it does not matter, for the record is clear that, if not arrested at Dulles, Erdos was subsequently arrested at Alexandria, also within the jurisdiction of the district court.

Findings of fact by a district court in a criminal case may not be disturbed on appeal unless they are clearly erroneous. *Campbell* v. *United States*, 373 U.S. 487, 493 (1963); *United States* v. *Graves*, 428 F.2d 196, 200 (5th Cir. 1970). After carefully examining the record we believe there was ample evidence from which the district court could find that Erdos was *not* in custody within the meaning of 18 U.S.C. § 3238 when his flight landed in Boston and, therefore, that venue was appropriate in the Eastern District of Virginia since that was the district in which he was first arrested.

Cross-Examination

At trial Erdos admitted killing Leahy and pleaded insanity as his defense. In furtherance of his defense, Erdos called as witnesses four psychiatric nurses who had attend-

---

[5] The following colloquy between counsel for Erdos and the district judge demonstrates agreement that Erdos's movements after his arrival at Dulles were not restrained.

> THE COURT: [T]hey claim when he landed he was never in custody, that they did give a summons, just like a parking ticket, to appear on a certain day, but he was not arrested, he was free to go where he wanted to.
>
> MR. MCDANIELS: That is correct.
>
> THE COURT: And he did go where he wanted to.
>
> MR. MCDANIELS: That is correct."

ed him during his hospitalization and two psychiatrists. In rebuttal the government called two court-appointed psychiatrists, both of whom testified on direct examination that Erdos was only feigning mental illness after he killed Leahy.

While cross-examining one of the court-appointed psychiatrists, counsel for Erdos attempted to question the witness from an apparently recognized psychiatric treatise. The district judge sustained the government's objections to the use of the psychiatric treatise after the witness said that he had "read portions of it . . . [but was] not familiar with the whole text."

There has been much progress in recent years toward expanding the "learned treatise" exception to the hearsay rule to allow liberal cross-examination of expert witnesses from respected texts.[6] This trend was recognized and approved by the Supreme Court in *Reilly* v. *Pinkus*, 338 U.S. 269, 275 (1949), and expressly adopted by this court in *Lawrence* v. *Nutter*, 203 F.2d 540 (4th Cir. 1953), at 543:

> We need go no further in the pending case than to hold that the attention of an expert may be called in the course of cross examination to statements in conflict with his testimony contained in relevant scientific works which he recognizes as authoritative. This holding accords . . . with the more liberal view taken in the recent cases . . . .

Before allowing cross-examination from a treatise, however, it must be established that the book is known by the witness and is a generally respected authority in the relevant field. *Reilly*, *supra*, at 275; *Lawrence*, *supra*, at 542.

---

[6] *See* Proposed Rules of Evidence for United States Courts and Magistrates, R. 803(18), 12 Cr. L. 3011, 3021 (Nov. 20, 1972); 6 Wigmore on Evidence §§ 1690-1700 (3d ed. 1940).

Since the district court prevented counsel for Erdos from establishing the authenticity and authority of the book, we assume it to be a "learned treatise" for purposes of appeal. We hold it was error to restrict cross-examination from this text. But error alone is not sufficient to justify reversal. Erdos was given every opportunity during his trial to present evidence supporting his defense of insanity. He was allowed ample latitude both in the direct examination of his own numerous witnesses and on cross-examination of the court-appointed psychiatrists. We think the curtailing of the cross-examination of one witness from one particular treatise during a lengthy trial was not error so grave as to require reversal where extensive evidence was properly admitted on the issue in question. Erdos's rights were not substantially affected by this incorrect ruling, and we therefore disregard the error.[7]

AFFIRMED.

---

[7] 28 U.S.C. § 2111 provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Fed. R. Crim. P. 52(a) provides:

> Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

See Chapman v. California, 386 U.S. 18, 22 (1967).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1328

UNITED STATES OF AMERICA, *Appellee,*

v.

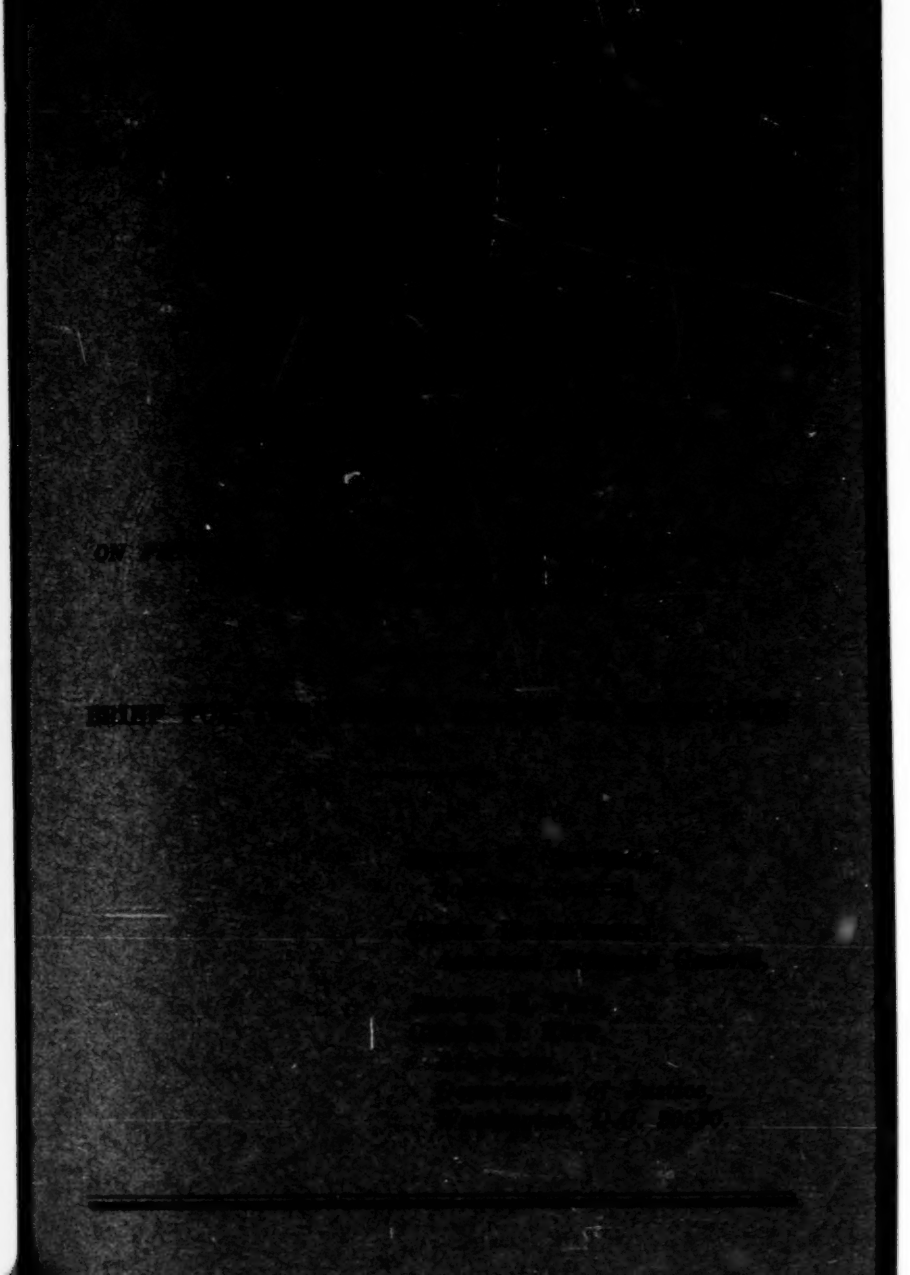
ALFRED ERDOS, *Appellant.*

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge.

Order

After careful consideration and with the concurrence of Judge Haynsworth and Judge Widener, the petition for rehearing is denied. No member of the court having requested a poll on the suggestion for rehearing en banc, the petition for reconsideration en banc is also denied.

/s/ J. BRAXTON CRAVEN, JR.
United States Circuit Judge



INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes involved	2
Statement	4
Argument	7
Conclusion	16

CITATIONS

Cases:

Battle v. *United States*, 209 U.S. 36	8
Blackwell v. *United States*, 405 F. 2d 625, certiorari denied, 395 U.S. 962	12
Chambers v. *Mississippi*, No. 71-5908, decided January 21, 1973	12, 13
United States v. *American Trucking Associations*, 310 U.S. 534	10
United States v. *Bowman*, 260 U.S. 94	9, 10
United States v. *Flores*, 289 U.S. 137	7, 8
United States v. *Reynolds*, 345 U.S. 1	15
United States v. *Rodgers*, 150 U.S. 249	8
Vermilya-Brown Co. v. *Connell*, 335 U.S. 377	8, 11

Statutes:

18 U.S.C. 7	2-3, 7-8, 9, 10
18 U.S.C. 1112	3-4, 9, 10

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1386

ALFRED J. ERDOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 10a-18a) is reported at 474 F. 2d 157.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1973. A petition for rehearing was denied on March 15, 1973. The petition for a writ of certiorari was filed on April 13, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court had jurisdiction to try petitioner, an American diplomat, for murder of

a Foreign Service officer committed within a United States embassy in a foreign country.

2. Whether in the circumstances of this case the district court abused its discretion in denying petitioner's motion for a continuance.

3. Whether the trial court erred in excluding from evidence twelve messages from petitioner to the Department of State.

4. Whether the trial judge committed reversible error in limiting petitioner's cross-examination of a prosecution witness.

STATUTES INVOLVED

18 U.S.C. 7 provides:

> The term "special maritime and territorial jurisdiction of the United States," as used in this title, includes:
>
> > (1) The high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, and any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, District, or possession thereof, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.
> >
> > (2) Any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of

any of the Great Lakes, or any of the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

(4) Any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.

(5) Any aircraft belonging in whole or in part to the United States, or any citizen thereof, or to any corporation created by or under the laws of the United States, or any State, Territory, District, or possession thereof, while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

18 U.S.C. 1112 provides:

(a) Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

Voluntary—Upon a sudden quarrel or heat of passion.

Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due

caution and circumspection, of a lawful act which might produce death.

(b) Within the special maritime and territorial jurisdiction of the United States,

Whoever is guilty of voluntary manslaughter, shall be imprisoned not more than ten years;

Whoever is guilty of involuntary manslaughter, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of voluntary manslaughter within the special maritime and territorial jurisdiction of the United States in violation of 18 U.S.C. 1112. He was sentenced to a ten-year term of imprisonment. The court of appeals affirmed (Pet. App. 10a-18a).

The case involves the killing of a Foreign Service security officer within the United States Embassy at Santa Isabel, Equatorial Guinea.[1] The facts adduced at trial showed that on August 30, 1971, at 4:00 p.m., the American Embassy in Yaounda, Cameroon, received an urgent message from petitioner, the Chargé d'Affaires of the United States Embassy in Equatorial Guinea (G.A. 37, 38).[2] In this message,

---

[1] Equatorial Guinea is located in west-central Africa. The capital—Santa Isabel—is in the Province of Fernando Po, which comprises an island 20 miles off the coast of Africa in the Gulf of Guinea.

[2] "G.A." and "A." designate references to the government appendix and the joint appendix in the court of appeals, copies of which we are lodging with the Clerk of this Court.

petitioner stated that "the United States was the victim of a massive conspiracy, * * * that the chancery was surrounded, that he was locked in the vault with his administrative assistant who was a communist agent" and asked for assistance (G.A. 38-39).[3]

As a result of this message, Leonard Shurtleff, American Consul in Douala, Cameroon, was dispatched to Santa Isabel to investigate the situation (A. 21; G.A. 15-16). Arriving at approximately 6:30 p.m., Shurtleff attempted unsuccessfully to locate petitioner and his administrative assistant, Donald Leahy, at their homes; he then proceeded to the embassy (G.A. 16-17). He was met at the front door by petitioner, who refused to admit him (G.A. 17). Petitioner, however, asked Shurtleff to locate his (petitioner's) wife and bring her to the embassy. Shortly thereafter, Shurtleff returned to the embassy with petitioner's wife and son, and Mrs. Leahy (G.A. 18). Petitioner admitted only his wife (Mrs. Erdos) and son (G.A. 18-19). While Mrs. Erdos was in the embassy, Shurtleff was able to overhear a portion of a conversation in which petitioner stated, "You've got to believe me; they will think I'm crazy" (G.A. 19). After approximately an hour, petitioner came out of the embassy and told Shurtleff that "he blew his cool and killed Don Leahy" and that this had been the result of the "terrible pressure he had been under the last few days" (G.A. 20).

---

[3] The complete text of petitioner's message appears at A. 234-237.

Shurtleff entered the then empty embassy and began to check the office (G.A. 20-21). As he entered the vault, he heard a scream (G.A. 21). It was Mrs. Leahy, in a side office which Shurtleff had not checked; she was clutching the body of her husband (G.A. 21). A pair of bloody scissors was found on a nearby desk (G.A. 23).

When Leahy's body was brought back to the United States an autopsy revealed that he had been stabbed ten times, the lethal wound being in the neck (G.A. 7). The post-mortum examination also revealed the presence of spermatozoa in the upper respiratory tract (G.A. 7). The forensic pathologist who conducted the autopsy testified that in his opinion, based upon the nature of the wounds coupled with the presence of sperm in the pharynx and esophagus, Leahy's death was a homosexual murder (G.A. 10).

On September 24, 1971, petitioner, accompanied by counsel, voluntarily flew back to Virginia, where he was placed under arrest.

Petitioner testified in his own defense and admitted that he had killed Leahy by stabbing him with a pair of scissors (G.A. 63-64). However, he asserted a defense based on insanity claiming that the political climate of Equatorial Guinea had caused him to undergo a mental breakdown. He further testified that he had murdered his administrative assistant while acting under the delusion that Leahy was a communist agent and was part of a massive conspiracy against the United States (G.A. 53-62). The defense also presented testimony of two psychiatrists who had

examined petitioner and concluded that, on the date of the killing, he was suffering from acute paranoid psychosis and, as a result, had lacked the mental capacity to appreciate the criminality of his conduct (G.A. 84-85, 88, 95).

In rebuttal, the prosecution introduced the testimony of two psychiatrists who had examined petitioner and found him without psychosis or insanity at the time of the murder (G.A. 116, 126).

ARGUMENT

1. It is well settled that Congress has the power to proscribe the killing of an American citizen by another citizen of the United States within a diplomatic compound located in a foreign country. See, *e.g.*, *United States* v. *Flores*, 289 U.S. 137, 146-147. Petitioner does not argue otherwise, rather he claims that Congress has not exercised that power to proscribe the commission of homicide involving Foreign Service personnel in a United States embassy located in a foreign country.

The answer to this question turns on the scope of 18 U.S.C. 7(3) which provides in part that the special maritime and territorial jurisdiction of the United States shall include—

> Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the

> erection of a fort, magazine, arsenal, dockyard, or other needful building.

Petitioner argues that the third phrase of this section—"any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be"—modifies and thus limits the broad jurisdiction conferred by the preceding two phrases. Petitioner's claim was properly answered in the opinion of the court below on which we rely (Pet. App. 13a):

> Where the power of the Congress is clear, and the language of exercise is broad, we perceive no duty to construe a statute narrowly. The first two phrases connected by the conjunctive "and" relate to and modify each other. The result is to create a jurisdictional category: lands reserved or acquired for the use of the United States and under its exclusive or concurrent jurisdiction. It is only the third phrase, separated from the first two by a comma and the disjunctive "or", that limits jurisdiction to places acquired (within the United States presumably) by the consent of state legislatures. We think the third phrase is independent of and does not modify the first two, and so read, the sentence describes two kinds of places or lands within the "special" jurisdiction of the United States.[4]

---

[4] Contrary to petitioner's claim, the courts have generally given the language of the statute its natural breadth. See *United States* v. *Flores*, 289 U.S. 137; *Battle* v. *United States*, 209 U.S. 36; *United States* v. *Rodgers*, 150 U.S. 249. See, also, *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377.

Additionally, we would submit that the "special maritime and territorial jurisdiction of the United States," for which the crime of manslaughter is proscribed by 18 U.S.C. 1112, is not necessarily limited to the areas defined in 18 U.S.C. 7. Section 7 provides only that the term "special maritime and territorial jurisdiction of the United States" as used in Title 18, "includes" the areas there set forth. There is nothing in Section 7 which limits the definition of "special maritime and territorial jurisdiction" only to the circumstances there enumerated, and both reason and justice compel the conclusion that it should be held to encompass a crime committed in a United States embassy involving citizens and employees of the United States. A United States embassy, as the court of appeals held, has traditionally been considered to be "constructively" part of the territory of the United States (Pet. App. 12a).[5] And testimony at trial showed that (A. 28-29):

> [As] a matter of diplomatic practice * * * an American embassy chancery, the building, and the Ambassador's residence cannot be entered by anyone without the approval of the authorities in charge. It is the same sort of principle that applies to a diplomatic pouch when it is under seal. If the pouch comes through the airport, the authorities of another government may not open the pouch without violating diplomatic practice and immunity.

[5] Cf. *United States* v. *Bowman*, 260 U.S. 94, 98-99, so describing a privately owned ship sailing under the United States flag.

Moreover, offenses against Foreign Service officers employed in the embassy are not merely private offenses but also have a serious impact on government operations and on our relations with other nations. Cf. *United States* v. *Bowman*, 260 U.S. 94, 98. The record here established that the murder of Mr. Leahy resulted in serious difficulties in our relationship with Equatorial Guinea and a temporary halt of the day-to-day operations of the American Embassy (A. 32-34).

While the legislative history of Section 7 (Pet. 14-17) does not indicate that Congress expressly contemplated the construction adopted by the court of appeals or that which we urge here, this construction is nevertheless consistent with the language of Section 7 and Section 1112, and the canon of construction that statutes not be construed to permit "absurd or futile results." *United States* v. *American Trucking Associations*, 310 U.S. 534, 543. The construction of Section 7 urged by petitioner would attribute to Congress the intention of permitting the brutal murder of a Foreign Service officer by an other government official, committed in a United States embassy, to go unpunished. Without some affirmative expression of congressional intent to accomplish this result, the court of appeals properly rejected such a construction. As this Court held in an analogous context:

> Under such circumstances, our duty as a Court is to construe the * * * [statute] as our judgment instructs us the lawmakers, within consti-

tutional limits, would have done had they acted at the time of the legislation with the present situation in mind. [*Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 388.] [6]

In sum, given the inherent reasonableness of the construction placed on Section 7 by the court of appeals, and the fact that, as petitioner notes (Pet. 17), Congress is now considering proposals which will clarify any ambiguity in the statute, there is no reason for further review on this issue.

2. Petitioner contends that the trial court erred in denying his motion for a two-month continuance. The continuance was sought to permit petitioner additional time to obtain the testimony of three foreign diplomats (representatives of France, Nigeria, and Spain), all of whom allegedly had the opportunity to observe petitioner's conduct immediately preceding and following Leahy's murder.

As petitioner notes, each of these potential witnesses was a foreign national and thus not subject to the jurisdiction of the district court. The State Department, however, undertook to assist the defense

[6] In *Vermilya-Brown Co.* v. *Connell*, *supra*, it was held that the Fair Labor Standards Act which by its terms was applicable to "any State of the United States or the District of Columbia or any Territory or possession in the United States," applied to a military installation in Bermuda leased by the United States from Great Britain. Such an installation was held to be a "possession" of the United States within the meaning of Section 3(c) of the Act even though the leased area was under "the sovereignty of Great Britain and * * * it [was] not territory of the United States in a political sense, that is, a part of its national domain" (335 U.S. at 379-381).

in obtaining this testimony. Through the State Department, inquiries were forwarded to the respective foreign governments, requesting their assistance in making these witnesses available (A. 114-126). Prior to trial, Spain refused to make its representative available; the governments of Nigeria and France did not respond to the State Department's requests.[7] Thus, the trial court was presented with a situation where petitioner was unable to show when these witnesses could be produced, or even suggest, absent pure speculation, that they could ever be produced. Under these circumstances, there was no abuse of discretion in denying a postponement of trial. See *Blackwell* v. *United States*, 405 F. 2d 625, 627 (C.A. 5), certiorari denied, 395 U.S. 962.

Petitioner's claim that the testimony of these officials should have been stipulated to by the United States Attorney is without merit. Although these officials had been interviewed by the United States Ambassador to Equatorial Guinea, who was sympathetic to petitioner and testified as a defense witness, they had not been interviewed by the United States Attorney or any federal law enforcement officer, nor had they made any statements under oath and subject to cross-examination. The decision in *Chambers* v. *Mississippi*, No. 71-5908, decided January 21, 1973, cited by petitioner (p. 18), is of no assistance to him. There the Court reaffirmed the well-settled

[7] We are advised by the Department of State that after the trial it received word from Nigeria that it would not make its Ambassador available.

principle that "[o]ut-of-court statements are traditionally excluded because they lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury" (slip op. 14).

The Court further noted in *Chambers* that "[a] number of exceptions have developed over the years to allow admission of hearsay statements made under circumstances that tend to assure reliability and thereby compensate for the absence of the oath and opportunity for cross-examination" (*ibid.*). But the out-of-court statements here, unlike those in *Chambers*, were made by petitioner's friends and colleagues under circumstances that did not in any way tend to "assure reliability."

Moreover, a review of the proposed stipulations indicates that a good deal of the testimony petitioner sought to elicit was inadmissible or cumulative and that petitioner was not prejudiced either by the failure to stipulate or the absence of these witnesses.

a. Petitioner claimed that the French Chargé d'Affaires, Jean Robert, would testify that while petitioner "seemed agitated and abrupt" on the day prior to the murder, on the following day (shortly before the crime was committed) Mr. Robert found petitioner in a "better frame of mind," "laughing" about the circumstances which caused him to be up-

set the day before (A. 171-172). This evidence would actually have contradicted petitioner's claims. Moreover, Mr. Robert's conclusion that the murder was "an act of madness" was plainly inadmissible (A. 172).

b. The proposed testimony of the Nigerian Ambassador and the Spanish Chargé d'Affaires (A. 173-179) related principally to (1) petitioner's apparent condition and his self-serving statements after the offense (which were, in any event, testified to by petitioner, his wife, and, to a more limited extent, by the United States Ambassador (Tr. 680)), and (2) the political situation in Equatorial Guinea and its alleged effect on petitioner. The political situation was, however, shown by message traffic with the Department of State. Moreover the testimony of the United States Ambassador, who was temporarily in the United States at the time of the crime, to the effect that he was disturbed by the less than coherent messages petitioner was sending back home (Tr. 675-676, 679-680), lent far more support to petitioner's case than the several vague references in the proposed stipulations.

In any event, as previously noted, neither the Spanish nor Nigerian governments would make these officials available.[8] There was, therefore, no error in denying the motion for a continuance.

---

[8] The district court did not abuse its discretion in refusing to admit Defense Exhibit 69 which petitioner claims was "a transcript of the message which [petitioner] Erdos described preparing with the aid of Leahy the morning of Leahy's death" (Pet. 21, n. 9). The message was decoded from a tape

3. Petitioner also asserts as error the trial court's ruling that certain messages from him to the State Department were inadmissible. The messages in question were transmitted between June 15 and August 21, 1971, and contained petitioner's observations on the political situation in Equatorial Guinea. The vast majority of the message traffic, comprising over fifty exhibits, was admitted without objection (A. 216-217). While petitioner seeks to couch the district court's exclusion of some of the messages in terms of "executive privilege," and thus bring the ruling within the terms of *United States* v. *Reynolds*, 345 U.S. 1, it is clear that the prosecution's objection was sustained on the basis of relevancy. Indeed, the trial judge in responding to petitioner's request for clarification of the ruling, stated that "they contain confidential information and reports involving a foreign country which the Court, upon examining the documents, is of the opinion it has no relevancy really even on his state of mind" (A. 217). This ruling reflected a permissible exercise of discretion in the context of this case. Moreover, most of

---

found in the embassy burn bag that was returned to Washington. Petitioner, however, testified he did not prepare the particular message and didn't know who did (Tr. 628). Petitioner could not even say where it came from (Tr. 629). Likewise he was unable to say the exhibit was the exact copy of the handwritten copy which he claimed he wrote and destroyed (Tr. 629). Moreover, in light of the admission into evidence of the irrational message petitioner had earlier sent on the day of the murder to the American Embassy in Cameroon (see *supra*, pp. 4-5), any error in the exclusion of this evidence was harmless.

the messages were admitted, and petitioner was permitted to testify about the contents of the exhibits that were excluded.

4. Finally, petitioner claims the trial court committed reversible error in prohibiting his cross-examination of one of prosecution's rebuttal witnesses, a psychiatrist, by using a psychiatric treatise. This contention was fully considered by the court below (Pet. App. 16a-18a); it properly concluded that, while it may have been better practice to permit cross-examination from the text, it "was not error so grave as to require reversal where extensive evidence was properly admitted on the issue in question" (Pet. App. 18a).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

JEROME M. FEIT,
GEORGE S. KOPP,
Attorneys.

JUNE 1973.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1973 506632 705